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Customary Land Rights and Pacific Islands Security & Stability

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Dr. Iati Iati, Senior Lecturer at the University of Otago, New Zealand explains that “Reforms, particularly those which involve or even intimate alienation of customary lands, have been very unpopular in the Pacific.”

Over the past several decades, efforts to achieve greater development through a neo-liberal, market-based agenda have led to the intensification of programs to reform customary land tenure in the Pacific. There are two approaches to achieving this: the abolition model, and the adaptation model. The abolition model views customary land tenure as a barrier to entrepreneurship and private sector investment that needs to be abolished. Tenets of the abolition model were advocated by scholars such as Steven Gosarevski, Helen Hughes, and Susan Windybank in the early 2000s. These scholars proposed the abolition of communal land titles in favor of individual ones, based on the argument that no society had developed using the former. This model has not gained traction with any countries or donors in the Pacific.

The ‘adaptation model’, is premised on the idea that customary land tenure can be maintained but transformed to suit economic development plans whilst retaining its key principles and practices. An example was the 2006 USAID Land Mobilization Program, funded with \$90m, to examine ways of overcoming the major land tenure constraints for private sector growth.. The program sought to strengthen property rights, and in particular certainty of title, while protecting “customary land rights” and reducing “the potential for land-related conflict”. Although this model appears much more acceptable, it has also met with implementation difficulties. The Australian government under Kevin Rudd defunded the Program in 2011, because it “did not cut the mustard”.

Obviously, the adaptation model poses far less risk for customary land tenure, but the issue is whether it can preserve customary land rights, and if not, what the implications are. This model can take a number of forms, and one that is central to current land reform efforts is the adoption of the Torrens system for the registration of customary land leases. At independence, most Pacific countries employed the deeds conveyance system to establish title to land. Title was credited to the party that registered the superior instruments of claim, such as a sale and purchase agreement, in the land register. Many countries have since adopted or are seeking to apply and enforce the Torrens system, which determines title by registration; whichever party’s name is on the title for the land in question is considered the owner, even if there are infirmities attached to the title. While this generally applies to all types of land: customary, freehold, and public, it will probably have its most significant impact on the first, because customary lands make up the majority of lands in most Pacific island countries.

Throughout the Pacific, there are constitutional and legislative prohibitions against the alienation of customary lands, which usually refers to their sale and purchase. The leasing of customary lands has been used as a way to overcome this barrier to investment. However, leasing under the deeds system has often proved difficult because customary land ownership in

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the Pacific lacks certainty of title. Constant court challenges to ownership interests make leasing interests susceptible to ownership changes when these are successful, resulting in uncertainty about who owns what, and a disincentive to lease for investment purposes. The Torrens system solves this dilemma, for investors at least, because it limits the challenges to ownership and leasehold interests. The person whose name is on the title of a piece of land is considered to be titleholder, regardless of any problems or in legal language, infirmities, with his or her title (there is a very limited exception to this rule). Therefore, investors are assured that once they are registered on the title for a particular interest in the land, whether its ownership or leasehold, this cannot be challenged.

Although this solves the problem for the investor, it poses a problem for owners of customary lands whose titles have been fraudulently changed or usurped. While they can have recourse against a person who registers a title to their land through fraud, if the erroneous titleholder then leases or sells that title, the third party purchaser will receive a clean title, or in legal terms, an indefeasible title (the purchaser’s title cannot be defeated). The true owner of lands that are leased under the Torrens system may receive compensation, but would have all their rights to the land in question extinguished, permanently in the case of a sale and purchase, and for a lease, during the lease period. A lease gives the lessee a right to ‘exclusive possession’, which means they can exclude even the owner. A number of cases of this type have already occurred in the Pacific.

The ostensible benefits of the adaption model for Pacific island societies, therefore, could have disastrous results for customary land owners. The Torrens system could be the Pacific’s Trojan horse. The constitutional, legislative and customary protections against alienation through sale and purchase are likely to be useless in leasing arrangements.

Unfortunately, the negative outcomes are unlikely to stop with customary land owners. Customary lands often underpin Pacific societies’ cultural and socio-political frameworks. In Samoa, for example, where over 80% of lands are under customary tenure, all chiefly titles are attached to customary lands. Chiefs (Matai) are akin to legal owners of these lands, who owe fiduciary duties to the intended beneficiaries of the lands: villages, clans or extended families. The authority and power of Matai is, in part, determined by their control of these lands. The chiefly system encompasses local and national politics; chiefs constitute village councils, and membership of Parliament is limited to chiefs. Changing customary land tenure will have a ripple effect through the political system. Customary land owners and beneficiaries, which make up the majority of the population, are likely to take exception to these changes, and how they are manifest is uncertain.

However, one thing is certain. Reforms, particularly those which involve or even intimate alienation of customary lands, have been very unpopular in the Pacific. Notably, customary land tenure issues have a strong link to the major security issues in the region such as the Bougainville conflict, the Solomon Islands conflict, and the Fiji coups. Meddling with customary land tenure rights in the Pacific will not only be controversial, but transformational, and how these transformations play out will have a profound impact on the security and stability of these societies.

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